Tan Beng Sooi v Penolong Kanan Pendaftar (United Merchant Finance Bhd, Intervener)

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 24–168 OF 1994
LOW HOP BING JC
29 OCTOBER 1994

Auctions and Auctioneers *— Sale of land — Commission — Auction sale aborted as there were no bidders — Whether scale fees payable — Registrar's discretion under r 7(a) of the Auction Sales Enactment Rules — Whether can set fixed fee — Factors to be considered in exercising discretion — Whether there are any prerequisites to applicability of scale fees under r 7(b) — Auction Sales Enactment Rules r 7(b)*

Civil Procedure *— Jurisdiction — Inherent jurisdiction — Ambit of — Whether can be used to take away substantive rights that may have vested — Rules of the High Court 1980 O 92 r 4*

This was an application by the plaintiff, a licensed registered auctioneer under the Auction Sales Enactment 1932 ('the Enactment'), for declarations, inter alia, that: (i) the circular dated 6 August 1992 ('the said circular') issued by the senior assistant registrar of the High Court, Johor Bahru to licensed auctioneers, High Court, Johor Bahru is ultra vires r 7(b) of the Auction Sales Enactment Rules ('the Rules') and thus void; and (ii) costs of two abortive auctions conducted by him be awarded based on r 7(b) of the Rules. The plaintiff had conducted two auctions at which there were no bidders. Payment of the plaintiff's fees were later made based on the said circular. The said circular provided that an auctioneer was to be paid a fixed commission of RM100 (apart from disbursements) for each abortive auction conducted. The defendant submitted that r 7(b) was applicable only where: (i) the reserve price was kept secret; (ii) bidding had started; and (iii) there was no sale because the reserve price was not reached. The defendant argued that therefore, where the auction was cancelled or adjourned by the court, the registrar had a discretion to prescribe the fees pursuant to r 7(a) of the Rules or alternatively under the inherent jurisdiction of the court. The main issues to be decided were: (a) the proper construction of r 7(a) and (b) of the Rules; and (b) whether the said circular was ultra vires r 7(b).

Counsel for the intervener made a preliminary objection that the application by the plaintiff for a declaration was irregular, premature and/or an abuse of the process of the court, since the plaintiff had not exhausted the remedy under O 59 r 34 of the Rules of the High Court 1980 ('the RHC') for the matter to be taxed by the registrar of the court.

Held, allowing the application:

(1) The preliminary objection had no merit. Order 15 r 16 of the RHC provides that no action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not consequential relief is or could be claimed. Thus, the court's jurisdiction to make a declaratory order is unlimited, subject only to its own discretion. The court has the power to grant a declaration irrespective of whether an applicant has a cause of action or not and even if a cause of action does not exist at the time of the filing of an application.

(2) It had become an established practice of the court not to keep the reserve price as a guarded secret but instead to state specifically, in the proclamation of sale, the reserve price which must first be approved by the deputy registrar, having regard to the valuation report tendered and admitted in the proceedings pertaining to summons for directions.

(3) The alleged prerequisite of secrecy in the reserve price for the application of r 7(b) of the Rules was not supportable in law nor in consonance with the established rules of construction in relation to a subordinate or delegated legislation. Where an expression is used in any form of legislation, it must be interpreted in accordance with the ordinary canons of construction. Upon a proper construction of r 7(b), it did not contemplate the concealment of the reserve price from any prospective bidder.

(4) The discretion stated in r 7(a) of the Rules could not be exercised by stipulating a fixed sum of RM100 without hearing the auctioneer, as each case had to be considered on its merits and on established principles having regard to factors such as the properties involved, the time expended and whether any special skill was exercised. There was no evidence that the defendant had given the plaintiff the opportunity of presenting his views when the defendant drastically reduced the fees payable from the scale fee under r 7(b) to the fee which the defendant thought fit to pay under r 7(a) or under the said circular. There was thus no proper exercise of the discretion in this case.

(5) The inherent jurisdiction of the court under O 92 r 4 was a procedural rule and was not intended to alter substantive rights. It must be applied to do justice to the parties and to secure fairness in a trial between them but not for any other purpose such as taking away the substantive rights of the plaintiff in this case.

(6) Although r 5 of the Rules gives the registrar a discretion to approve any special rate of remuneration other than that provided in the scale, it does not in effect give legislative powers to the registrar. In issuing the said circular, the registrar had exceeded her powers under the Enactment or the Rules. The circular was

thus ultra vires the Enactment and the Rules, null and void and of no effect whatsoever.

(7) The judgment herein is effective in relation to the plaintiff in this case and to all other auctioneers who make their respective claims for their fees in respect of all auction sales conducted on or after the date of this judgment while fees claimed by auctioneers in respect of all auction sales before the date of this judgment will remain undisturbed and not be affected.

[Bahasa Malaysia summary

Ini adalah satu permohonan oleh plaintif, seorang pelelong berlesen yang didaftarkan di bawah Enakmen Jualan Lelong 1932 ('Enakmen itu'), untuk deklarasi, antara lainnya, bahawa: (a) surat pekeliling bertarikh 6 Ogos 1992 ('pekeliling itu') yang dikeluarkan oleh penolong kanan pendaftar, Mahkamah Tinggi, Johor Bahru kepada pelelong-pelelong berlesen, Mahkamah Tinggi, Johor Bahru adalah ultra vires k 7(b) Kaedah-Kaedah Enakmen Jualan Lelong ('Kaedah-Kaedah itu') and oleh itu terbatal; dan (b) kos berkenaan dengan jualan lelong yang tidak berjaya yang dikendalikan olehnya diawardkan berdasarkan k 7(b) Kaedah-Kaedah itu. Plaintif telah mengendalikan dua jualan lelong di mana tidak ada orang yang membuat tawaran. Bayaran fee plaintif kemudiannya dibuat berdasarkan pekeliling itu. Pekeliling itu memperuntukkan bahawa seorang pelelong akan dibayar komisyen tetap sebanyak RM100 (selain daripada pembelanjaan) untuk setiap jualan lelong yang dikendalikan olehnya yang tidak berjaya. Defendan berhujah bahawa k 7(b) cuma terpakai di mana: (i) harga rizab telah dirahsiakan; (ii) proses tawar-menawar telah bermula; dan (iii) tidak terdapat jualan kerana harga rizab itu tidak dapat dicapai. Defendan berhujah bahawa di mana jualan lelong telah dibatalkan atau ditangguhkan oleh mahkamah, pendaftar mempunyai budi bicara untuk menetapkan fee yang harus dibayar menurut k 7(a) Kaedah-Kaedah itu, atau secara alternatifnya, di bawah bidang kuasa sedia ada mahkamah. Isu-isu utama untuk diputuskan adalah: (a) apakah pentafsiran k 7(a) dan (b) Kaedah-Kaedah itu yang betul; dan (b) sama ada pekeliling itu adalah ultra vires k 7(b).

Peguambela untuk pencelah telah membuat suatu bantahan permulaan bahawa permohonan oleh plaintif untuk satu deklarasi adalah tidak teratur, terlalu awal dan/atau merupakan satu penyalahgunaan proses mahkamah, memandangkan yang plaintif belum menghabiskan remedi di bawah A 59 k 34 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') supaya perkara itu ditaksirkan oleh pendaftar mahkamah.

Diputuskan, membenarkan permohonan itu:

(1) Bantahan permulaan itu tidak mempunyai merit. Aturan 15 k 16 KMT memperuntukkan bahawa tiada tindakan atau prosiding lain boleh terbuka kepada bantahan atas alasan bahawa cuma

satu penghakiman atau perintah deklaratori diminta dengan demikian itu, dan mahkamah boleh membuat deklarasi hak yang mengikat sama ada atau tidak relief berbangkitan ada atau boleh dituntut. Oleh itu, bidang kuasa mahkamah untuk membuat perintah deklaratori adalah tidak terbatas, tertakluk cuma kepada budi bicaranya sendiri. Mahkamah mempunyai kuasa untuk memberikan deklarasi tidak kira sama ada seseorang pemohon itu mempunyai kausa tindakan atau tidak, dan meskipun suatu kausa tindakan tidak wujud semasa permohonan itu difailkan.

(2) Telahpun menjadi amalan mantap mahkamah supaya tidak merahsiakan harga rizab tetapi sebaliknya menyatakan secara spesifik, di dalam perisytiharan jualan, harga rizab itu yang mesti terlebih dahulu diluluskan oleh pendaftar, selepas mengambil kira laporan penilaian yang dikemukakan dan diterima di dalam prosiding berkenaan dengan saman untuk arahan.

(3) Prasyarat yang dikatakan tentang kerahsiaan harga rizab sebelum k 7(b) Kaedah-Kaedah itu terpakai tidak boleh disokong di sisi undang-undang dan tidak sejajar dengan rukun pentafsiran yang mantap berkenaan dengan perundangan bawahan atau perwakilan. Di mana sesuatu ungkapan digunakan di dalam sebarang bentuk perundangan, ianya mestilah ditafsirkan selaras dengan kaedah pentafsiran yang biasa. Atas pentafsiran k 7(b) yang sewajarnya, ianya tidak membayangkan bahawa harga rizab itu mestilah dirahsiakan daripada orang-orang yang bakal membuat tawaran.

(4) Budibicara yang dinyatakan di dalam k 7(a) Kaedah-Kaedah itu tidak boleh digunakan dengan menyatakan satu jumlah tetap sebanyak RM100 tanpa mendengar pelelong itu, kerana setiap kes itu mestilah dipertimbangkan atas meritnya dan atas prinsip yang mantap dengan mengambil kira faktor seperti hartanah yang terlibat, jumlah masa yang dimakan dan sama ada apa-apa kemahiran yang khas digunakan. Tidak terdapat keterangan bahawa defendan telah memberi peluang kepada plaintif untuk mengemukakan pendapatnya apabila defendan mengurangkan dengan drastik fee yang kena dibayar daripada fee skala di bawah k 7(b) kepada fee yang difikirkan patut oleh defendan mengikut k 7(a) atau di bawah pekeliling itu. Oleh itu tidak terdapat penggunaan budi bicara yang sewajarnya di dalam kes ini.

(5) Bidang kuasa sedia ada mahkamah di bawah A 92 k 4 adalah kaedah prosedur dan tidak bertujuan mengubah hak-hak substantif. Ianya mesti dipakai demi melakukan keadilan kepada pihak-pihak dan untuk menentukan kesaksamaan di dalam perbicaraan di antara mereka tetapi bukan untuk sebarang tujuan lain seperti pengetepian hak substantif plaintif di dalam kes ini.

(6) Walaupun k 5 Kaedah-Kaedah itu memberikan pendaftar budi bicara untuk meluluskan apa-apa kadar pembayaran selain daripada apa yang diperuntukkan di dalam skala, ia tidak pada hakikatnya memberikan kuasa perundangan kepada pendaftar

itu. Dalam mengeluarkan pekeliling itu, pendaftar telah melampaui kuasanya di bawah Enakmen itu atau Kaedah-Kaedah itu. Lantaran itu pekeliling itu adalah ultra vires Enakmen itu dan Kaedah-Kaedah itu, tidak sah dan terbatal dan tidak berkesan sama sekali.

(7) Penghakiman di sini adalah berkesan terhadap plaintif di dalam kes ini dan kepada kesemua pelelong yang lain yang membuat tuntutan mereka masing-masing untuk fee mereka bersangkutan dengan semua jualan lelong yang dikendalikan pada atau selepas tarikh penghakiman ini sementara fee yang telah dituntut oleh pelelong-pelelong bersangkutan dengan semua jualan lelong sebelum tarikh penghakiman ini akan kekal dan tidak diubah.]

Cases referred to

Hirendra Lal Bannerji v Chin Cheng Realty (Pte) Ltd [1986] 1 MLJ 220 (refd)

Ipoh Town Council & Anor v Ng Khoon Khoon (No 2) [1960] MLJ 227 (refd)

Mahesan a/l Subramaniam & Ors v Ponnusamy a/l p Rajoo & Ors [1994] 3 AMR 44:2296 (folld)

PP v Dato Yap Peng [1983] 2 MLJ 311 (folld)

Supputetchimi v Palmco Bina Sdn Bhd [1994] 2 MLJ 368 (folld)

Syed Kechik bin Mohamed, Datuk v Government of Malaysia & Anor [1979] 2 MLJ 101 (refd)

United Malayan Banking Corp Bhd v Indah Sejati Sdn Bhd [1992] 1 AMR 41 (refd)

Wolfe (decd); Heller v Wolfe, Re [1952] 2 All ER 545 (refd)

Legislation referred to

Auction Sales Enactment 1932 ss 4, 12

Auction Sales Enactment Rules rr 5, 7(a), (b)

National Land Code 1965 s 257(d)

Rules of the High Court 1980 O 15 r 16, O 59 r 34, O 92 r 4

M Ganapathy (*Gana Muthusamy & Co*) for the plaintiff.

Mohd Zawawi bin Salleh (Senior Federal Counsel) for the defendant.

Cur Adv Vult

Low Hop Bing JC:

APPLICATION

This is an application by the plaintiff for the following orders:

(1) A declaration that the circular dated 6 August 1992 issued by the senior assistant registrar, Johor Bahru to licensed auctioneers, High Court, Johor Bahru is ultra vires r 7(b) of the Auction Sales Enactment Rules ('the Rules'), and is by reason thereof void and of no effect.

(2) A declaration that the abortive costs for the auction in relation to the sale of the property known as Lot Nos 512 and 513, title Nos 35957 and 35958, respectively, in the Daerah Timur Laut Negeri Pulau Pinang at the reserve price of RM6m under r 7(b) of the Rules is RM16,015.50.

(3) A declaration that the abortive costs for the auction in relation to the sale of the property known as Lots 512 and 513, title Nos 35957 and 35958, respectively, in the Daerah Timur Laut Negeri Pulau Pinang (hereinafter referred to as 'the subject properties') at the reserve price of RM6m under r 7(b) of the Rules is RM15,573.50.

(4) If the above declarations are allowed, then the defendant be ordered to pay to the plaintiff the auctioneer's fees which have not been paid.

(5) That the costs of these proceedings be borne and paid by the defendant.

PRELIMINARY OBJECTION ON THE GROUNDS THAT THE APPLICATION IS IRREGULAR, PREMATURE AND/OR AN ABUSE OF THE PROCESS OF COURT

Learned counsel for the intervener submitted that the application herein for declaration is irregular, premature and/or an abuse of the process of the court, since the applicant has not exhausted the remedy under O 59 r 34 [of the Rules of the High Court 1980 ('the RHC')] for the matter to be taxed by the registrar of the court.

In my considered opinion, this preliminary objection has no merit. Under O 15 r 16 of the RHC:

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed.

The scope of this rule has received the following commentary in *Mallal's Supreme Court Practice* by Tan Sri Chang Min Tat and it reads as follows:

> Scope of the rule: The jurisdiction to make a declaration under the rule is not confined to cases in which the plaintiff has a complete and subsisting cause of action apart from the rule, or, in which the plaintiff also seeks relief apart from the declaration: *Guaranty Trust Co of New York v Hannay* [1915] 2 KB 536, CA. A declaration can be resorted to [to] ascertain and determine the rights of parties or to determine a point of law or in place of an order of certiorari, especially where the time to apply for the prerogative order has expired: *Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, FC, *Pyx Granite Co Ltd v Ministry of Housing & Local Government* [1960] AC 260; [1959] 3 All ER 1, HL(E) followed.

Further in the recent well-considered judgment of Zakaria Yatim J in *Mahesan a/l Subramaniam & Ors v Ponnusamy a/l P Rajoo & Ors* [1994] 3 AMR 44:2296, after referring to and analysing numerous authorities, including the judgment of the Federal Court in *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101, pertaining to the powers of the court to grant a declaratory judgment, his Lordship

concluded that the court's jurisdiction to make a declaratory order is unlimited, subject only to its own discretion. The court has the power to grant a declaration irrespective of whether the applicant has a cause of action or not. The court has the discretion to grant a declaration even if the cause of action does not exist at the time of the filing of the application.

On the foregoing grounds, I overrule this preliminary objection, and hold that the application is regular and hence not an abuse of the process of the court, and that this court has jurisdiction to make a declaratory order.

AGREED ISSUES FOR THE DETERMINATION OF THE COURT

The parties herein have agreed that the issues to be determined by the court are as follows:

(a) What is the proper construction of r 7(a) and (b) of the Rules?

(b) Whether the senior assistant registrar's circular dated 6 August 1992 is ultra vires r 7(b).

RULE 7 OF THE AUCTION SALES ENACTMENT RULES

This rule reads as follows:

(a) Where the order for sale by public auction is cancelled or the sale is postponed by order of Court before the completion of the sale the remuneration of the auctioneer shall be at the discretion of the taxing officer.

(b) Where property is put up by public auction but no sale takes place by reason of the reserve price not being reached the auctioneer shall receive half the commission which would have been payable under rule 5 calculated on such reserve price.

FACTS OF THIS CASE

These facts which are not disputed may be summarized as follows:

(1) The applicant is a licensed registered auctioneer under the Auction Sales Enactment 1932 ['the Enactment'].

(2) On 10 January 1993, the applicant was the auctioneer conducting an auction for the subject properties at the reserve price of RM6m.

(3) The said auction was abortive as there was no bidder. The auctioneer then sent a bill for RM16,015.50 to the deputy registrar of the High Court, Johor Bahru, based on r 7(b) above.

(4) On or about 12 June 1993, the auctioneer received a cheque from the Treasury for the total sum of RM908 in settlement of the said bill.

(5) On 31 July 1993, the auctioneer was also the auctioneer conducting an auction for the subject properties at the reserve price of RM6m.

(6) The said auction was abortive again as there was no bidder. Consequent thereto, the auctioneer sent a bill for RM15,573.50 to the deputy registrar of the High Court, Johor Bahru, based on the said r 7(b).

(7) On or about 16 November 1993, the auctioneer received a cheque from the Treasury for the sum of RM466 in settlement of the said bill.

(8) The auctioneer believed that his auction fees for the said abortive sales were calculated on the basis of the said circular dated 6 August 1992, which the applicant believes is ultra vires the Enactment and the Rules made thereunder.

(9) The deputy registrar of the High Court, Johor Bahru admitted that the above cheques were paid on the basis of the said circular, under which the applicant was paid a fixed commission of RM100 (apart from disbursements) for each of the above abortive auctions.

DEFENDANT'S CONTENTION

The defendant opines that the plaintiff's claim has no merit as r 7(b) is only applicable:

(a) where the reserve price is *kept secret*;

(b) bidding has started but the reserve price has not yet been reached; and

(c) there is no sale as the reserve price has not been reached.

In the circumstances, the defendant says that where the auction is cancelled or adjourned by the court, the deputy registrar has a discretion to prescribe the fees pursuant to r 7(a), or alternatively, under the inherent jurisdiction of the court pursuant to O 92 r 4 of the RHC.

CONSTRUCTION OF R 7(A) AND (B)

(1) *Rule 7(b)*

Upon a proper construction of r 7(b), I am unable to agree with the views of the defendant in relation to the application of r 7(b) above. To the best of my knowledge and belief, it has become an established practice of the court not to keep the reserve price as a guarded secret, but instead to state specifically, in the proclamation of sale, the reserve price which must first be approved by the deputy registrar, having regard to the valuation report tendered and admitted in the proceedings pertaining to the summons for directions. The openness of the reserve price is founded very firmly and strongly upon statutory provisions, for example:

(a) Section 4 of the Enactment:

(i) Section 4(d) requires the disclosure of:

'every other thing which it may be considered material for a purchaser to know in order to judge the nature and value of property'; and

(ii) under s 4(iv):

'such notice of sale or such statement of particulars and conditions of sale may expressly state that the sale is subject to reserve price ...';

(b) Section 257(d) of National Land Code 1965 provides that:

'Every order for sale by the Court under Section 256 shall:

...

(d) require the Registrar of the Court to fix a reserve price for the purpose of the sale being a price equal to the estimated market value of the land or lease in question'; and

(c) the Johor Conditions of Sale

Paragraph 1 — the highest bidder shall be the purchaser and if any dispute shall arise as to any bidding the property shall be put up again at the last undisputed bidding. There shall be a reserve price. (The conditions of sale pertaining to both auctions specifically stated that the subject properties are sold subject to the general conditions of sale known as the Johor Conditions of Sale.)

In the circumstances, I am of the considered view that the contention of the defendant in imposing an element of secrecy in the reserve price of the property for public auction as a prerequisite or precondition for the application of r 7(b) is not supportable in law nor is it in consonance with the established rules of construction applicable in relation to a subordinate or delegated legislation.

The construction of a subordinate or delegated legislation has been explained in a number of decisions of the courts. In *Hirendra Lal Bannerji v Chin Cheng Realty (Pte) Ltd* [1986] 1 MLJ 220, Lai Kiew Chai J (of the Singapore High Court) held [at p 222] that:

> ... in the construction of any statutory enactment or subsidiary legislation or any other document, the cardinal rule for its construction is that it should be construed according to the intention as expressed in the legislation or document itself. If the words in the legislation or document are themselves precise and unambiguous, there is no room for any construction other than the one expounding those words in their ordinary and natural meanings. At the same time, it is equally clear that, in those circumstances, the language has to be given effect, whatever may be the consequences. For both propositions, see Lord Blackburn in *The Direct United States Cable Co Ltd v The Anglo-American Telegraph Co Ltd* (1877) 2 App Cas 394 and Tindal CJ in *Warburton v Loveland* (1832) 2 D & CL 480.

Where an expression is used in any form of legislation, it must be interpreted in accordance with the ordinary canons of interpretation. (See *Ipoh Town Council & Anor v Ng Khoon Khoon (No 2)* [1960] MLJ 227.)

Upon a proper construction of r 7(b), I hold that it does not contemplate the concealment of or the retention of any degree of secrecy in the reserve price from any prospective or intending bidder. It has always been made public as the term 'public auction' requires, by way of written proclamation of sale posted on the notice-boards of the court or in the daily newspapers for public knowledge and consumption. In the circumstances, it is not open to the defendant to construe r 7(b) by importing into this rule the element of secrecy in the reserve price in order to render the provisions of r 7(b) inoperable or inapplicable to the undisputed facts of this case.

Again in relation to r 7(b), the words '*where property is put up by public auction* but no sale takes place by reason of the reserve price not being reached ...', must in my view be given their natural and ordinary meaning, which in effect contemplate that the auction has already commenced. Once the auction has commenced, two situations may arise, viz:

(a) there are no bidders (in which event, the reserve price can never be reached) and consequently there is no sale; or

(b) there are bidders but nevertheless the bidding did not reach the reserve price (in which event no sale can take place, by reason of the reserve price not being reached).

In both these situations, the reserve price is invariably disclosed.

In *United Malayan Banking Corp Bhd v Indah Sejati Sdn Bhd* [1992] 1 AMR 41, the Johor Bahru High Court (albeit obiter) has stated that under the Auction Rules, the auctioneer receives a fee of 0.5% on the value of property (ie based on scale and not based on the 'discretionary powers' of the registrar).

(2) *Rule 7(a)*

In relation to the construction to be placed on r 7(a), it is my considered view that the discretion as stated therein cannot be exercised by stipulating a fixed sum, viz RM100, without hearing the auctioneer, as each case has to be considered on its merit judicially and on established principles having regard to various factors such as the properties involved, the time expended and whether any special skill was exercised, etc. See *Re Wolfe (decd); Heller v Wolfe* [1952] 2 All ER 545. There is no evidence that the defendant has given the auctioneer the opportunity of presenting his views when the defendant drastically reduced the fees payable from the scale fee under r 7(b) to the 'fee' which the defendant thought fit to pay under r 7(a) or under the said circular. There is therefore no proper exercise of the discretion in this case.

INHERENT JURISDICTION OF THE COURT

The defendant also relies on the inherent jurisdiction of the court in fixing the quantum of commission.

In my considered opinion, the inherent jurisdiction of the court under O 92 r 4 cannot be used to deny the plaintiff of any legal right that may be vested in him under r 7(b). Inherent jurisdiction under the rules of court is a procedural rule and is not intended to alter substantive rights. In *Suppuletchimi v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368, Vincent Ng J had the occasion to consider the meaning of the phrase 'inherent jurisdiction of the court' [at p 381], which:

> ... was considered in the Singapore case of *Heng Joo See v Ho Pol Ling* (Divorce Petition No 94 of 1993) (unreported) wherein Coomaraswamy J restated with approval the definition put forward by Sir Jack Jacob, the former Senior Master of the Supreme Court in his article, 'The inherent jurisdiction of the Court' (1970) CLP 23 at p 51 which reads as follows:

> '... the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.'

I hold that the inherent jurisdiction of the court must be applied to do justice to the parties and to secure fairness in a trial between them but not for any other purpose such as taking away the substantive rights of the auctioneer in this case.

ULTRA VIRES

The said circular purports to make rules and to prescribe the fees due and payable to a licensed auctioneer having conduct of auction sales in the Johor Bahru High Court. The power to make rules has been conferred upon the Minister under s 12 of the Enactment. Section 12(a) says that the Minister may make rules to prescribe the fees payable, the nature and the amount of the security to be given under the Enactment. A deputy registrar has not been conferred with this regulation or rule-making power. Pursuant to s 12(a) and in exercise of the powers vested in him by this section, the Minister has made the Rules to provide for and to prescribe, inter alia, the fees payable under the said rules. Although r 5 gives the registrar a discretion to approve any special rate of remuneration either higher or lower than that provided in the scale, that discretion must be exercised judicially and according to established principles. Rule 5 does not in effect give legislative powers to the deputy registrar. In issuing the circular purporting to prescribe fees for the licensed auctioneers in the Johor Bahru High Court, the deputy registrar has indeed exceeded her powers under the Enactment or the Rules made thereunder and cannot be upheld. The circular is ultra vires the Enactment and the Rules, null and void and of no effect whatsoever. In the circumstances, I make an order in terms of this application. At the request of learned counsel for the auctioneer, I make no order as to costs in this case.

A declaration that the said circular is null and void is bound to affect the fees of all the auctioneers which were paid pursuant to the said circular which purportedly took effect from 6 August 1992. With a view to avoiding any difficulty, hardship or inconvenience which may arise therefrom, pertaining to previous bills of the auctioneers who were dealt with pursuant to the said circular, I hereby apply the doctrine of prospective overruling in this case, as has been applied by the Supreme Court in *PP v Dato Yap Peng* [1987] 2 MLJ 311 at pp 320–321, where Abdoolcader SCJ (as he then was) said:

> The general principle of retroactivity of a judicial declaration of invalidity of a law was overturned by the Supreme Court of the United States of America in *Linkletter v Walker* (1965) 381 US 618 (at p 628), when it devised the doctrine of prospective overruling in the constitutional sphere in 1965 as a practical solution for alleviating the inconveniences which would result from its decision declaring a law to be unconstitutional, after overruling its previous decision upholding its constitutionality. This doctrine was applied

by the Supreme Court of India in *LC Golak Nath v State of Punjab & Anor* AIR 1967 SC 1643 (at pp 1666–1669). The doctrine — to the effect that when a statute is held to be unconstitutional, after overruling a long-standing current of decisions to the contrary, the court will not give retrospective effect to the declaration of unconstitutionality so as to set aside proceedings of convictions or acquittals which had taken place under that statute prior to the date of the judgment which declared it to be unconstitutional, and convictions of the impugned statute previously will accordingly not be disturbed — can be applied by the Supreme Court as the highest court of the country in a matter arising under the Constitution to give such retroactive effect to its decision as it thinks fit to be moulded in accordance with the justice of the cause or matter before it — to be adhibited however with circumspection and as an exceptional measure in the light of the circumstances under consideration.

In England this doctrine has been recognized by the House of Lords by necessary implication in the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 80 issued by Lord Gardiner LC on behalf of himself and the Lords of Appeal in Ordinary on 26 July 1966. More recently, in *Jones v Secretary of State for Social Services* [1972] AC 944, two judges of the House of Lords, Lord Diplock (at p 1015) and Lord Simon of Glaisdale (at p 1026) were prepared to consider the application of the American doctrine of prospective overruling to England. In *Choice Investments Ltd v Jeromnimon* [1980] 2 WLR 80 Lord Denning MR in his judgment in the English Court of Appeal (at p 84) accepted the subsistence and application of the doctrine. In *Defrenne v Sabena* [1981] 1 All ER 122, the Court of Justice of the European Communities applied the doctrine of prospective overruling predicated on conditions of legal certainty which required the court, as an exceptional measure, to declare the law for the future only.

At the conclusion of argument of 19 March 1987, the court accordingly by a majority (Tun Mohamed Salleh Abas LP and Tan Sri Hashim Yeop A Sani SCJ dissenting) declared s 418A to be unconstitutional and void as being an infringement of the provisions of art 121(1) and applied the doctrine of prospective overruling so as not to give retrospective effect to the declaration made with the result that all proceedings of convictions or acquittals which had taken place under that section prior to the date of our judgment in this matter would remain undisturbed and not be affected, and the appeal was dismissed on this basis.

In the instant case, I make an order and declare that my judgment herein is effective in relation to the auctioneer in this matter and to all other auctioneers who make their respective claims for their fees in respect of all auction sales conducted on or after the date of the judgment herein, while fees claimed by auctioneers in respect of all auction sales before the date of this judgment will remain undisturbed and not be affected.

Application allowed.

Reported by Kevin Ooi